IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 76-653, 76-762, 76-769 and 76-774

ALLIED-GENERAL NUCLEAR SERVICES, ET AL.,
Petitioners,

against

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., and THE STATE OF NEW YORK.

COMMONWEALTH EDISON COMPANY, ET AL.,
Petitioners,

against

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., and THE STATE OF NEW YORK.

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

against

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., and THE STATE OF NEW YORK.

BALTIMORE GAS AND ELECTRIC COMPANY, ET AL.,
Petitioners,

against

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., and THE STATE OF NEW YORK.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT STATE OF NEW YORK IN OPPOSITION

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Statement

For many years the nuclear industry in this country has urged the wide-scale use of mixed oxide fuel, or plutonium recycle fuel, in light water nuclear power reactors.

Typically these facilities, which constitute virtually the Nation's entire line of reactors, had been fueled only with uranium. The industry pushed the country hard toward that technology through the 1960's under the aegis of the former Atomic Energy Commission ("AEC"). This drive culminated on November 11, 1975 in an order by the Nuclear Regulatory Commission ("NRC"), the AEC's successor agency, which allowed the interim licensing of plutonium recycle and those activities supporting or relating to plutonium recycle, in advance of a thoroughly considered formal decision by the Nation to proceed with plutonium recycle and prior to the legally required review by the NRC of the critical safeguards issues and other considerations of health, safety and the environment. 40 Fed. Reg. 53056 (November 14, 1975), as corrected 40 Fed. Reg. 59497 (December 24, 1975).* That order was reversed in part by the United States Court of Appeals for the Second Circuit and it is that court's decision which is the subject of these petitions for certiorari.

Some aspects of the regulatory and technological history of plutonium recycle are relevant for the purposes of this Court's determination on the several petitions.**

During the fission process inside the reactor core, new radioactive elements, including plutonium and numerous other high-level waste elements, are produced from certain of the fuel's uranium atoms. After a period of time and because of this buildup of fission products, fuel rods no longer support the fission process effectively in reactors, and they must be replaced. It is possible to take irradiated or "spent" fuel rods from a reactor and store them for indefinite periods of time in water, which keeps

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* Set forth in Appendix A to the petition in No. 76-653 (hereafter "Pet. App.").

** A more detailed description of the technology is contained in the Court of Appeals' opinion, Pet. App., A-39-43.

the temperature of the rods to safe levels and acts as a shield against radiation. Alternatively, it is possible to subject the fuel rods to a chemical extraction process and thereby release newly produced plutonium, unfissioned uranium and the waste products. Once separated from spent fuel, plutonium is the most toxic of the fission products. In small quantities it can be fashioned into a nuclear explosive. Hence, extensive safeguards must be employed to prevent theft or sabotage of plutonium and facilities utilizing this substance.

The National decision on plutonium recycle concerns the proposal to reprocess spent fuel in commercial-scale facilities and, after conversion of the extracted plutonium to plutonium oxide, to use the latter in conjunction with uranium dioxide in new "mixed oxide" fuel elements for reactors.

On February 12, 1974, the AEC announced that a generic impact statement would be prepared pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, ("NEPA"), prior to a decision whether to proceed with the wide-scale use of plutonium recycle fuel in reactors. 39 Fed. Reg. 5356. The draft "GESMO", that is the draft Generic Environmental Statement on the Use of Recycle Plutonium in Mixed Oxide Fuel in Light Water Reactors (WASH 1237) was released to the public on August 21, 1974. 39 Fed. Reg. 30186. The conclusion of the AEC's staff in the draft environmental impact statement (EIS) was that plutonium recycle should begin promptly. The staff concluded that the safeguards problem would be "manageable" and that a delay of plutonium recycle on that issue was not warranted since, in the staff's opinion, safeguards could be dealt with at a later date.

On January 20, 1975, however, in a letter to the NRC,* the President's Council on Environmental Quality ("CEQ") stated that it found the draft GESMO to be

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* Appendix A to this Brief.

an incomplete EIS under NEPA:

> "because it fails to present a detailed and comprehensive analysis of the environmental impacts of the potential diversion of special nuclear materials and of alternative safeguards programs to protect the public from such a threat." (Appendix A, p. 18).

The NRC was clearly warned by the CEQ not to make any decisions which might foreclose or render difficult a subsequent decision by the Nation not to implement plutonium recycle:

> "During the period in which the safeguards issue is being resolved, the Commission should take care to avoid actions which would foreclose future options, such as [integrated fuel cycle facilities] and power parks, or which would result in the unnecessary 'grandfathering' of certain nuclear facilities." (Appendix A, p. 20)

In response the NRC announced on May 6, 1975 it was of the provisional view that:

> "(1) there should be no additional licenses granted for use of mixed oxide fuel in light water nuclear power reactors except for experimental purposes; and (2) with respect to . . . fuel cycle activities . . . which depend for their justification on wide scale use of mixed oxide fuel in light water nuclear reactors, there should be no additional licenses granted which could foreclose future safeguards options or result in unnecessary 'grandfathering'. This would not preclude the granting of licenses for experimental and/or technical feasibility purposes." 40 Fed. Reg. 20142 at 20143.

The NRC solicited comment as to whether it should stand by its provisional statement or proceed with the licensing of fuel cycle activities, the justification for which would

be the wide-scale use of plutonium recycle fuel in nuclear reactors, prior to completion of GESMO and a final decision thereon.

After receiving much adverse comment from the nuclear industry, the NRC issued an order on November 11, 1975 which completely reversed its May 6, 1975 statement on interim licensing. The NRC announced that, despite the unresolved safeguards problem, it would allow interim licensing of plutonium recycle and individual fuel cycle activities before the completion of GESMO, public hearings, or a final decision on recycle (Pet. App., A-22). The State of New York filed a petition for review of that order in the United States Court of Appeals for the Second Circuit.

At the time this case was argued to the Court of Appeals, it was apparent from the papers before it that the industry was prepared to move quickly during the interim licensing period and effectively preclude a decision not to recycle plutonium on a wide scale. At the very least industry was ready to insure that a number of plutonium recycle related facilities would be opened. (Motion to Intervene of Allied General Nuclear Services, et al., dated January 7, 1976 at pp. 5-6; Motion to Intervene of Westinghouse Electric Corporation, dated January 16, 1976 at p. 4; Motion to Intervene of Commonwealth Edison Company, et al., undated, p. 4; Motion to Intervene of Baltimore Gas and Electric Company, et al., dated January 17, 1976; Motion to Intervene of Babcock and Wilcox, dated January 19, 1976 at p. 4).

The Commission itself had admitted "that certain licensing actions have the potential for foreclosing subsequent alternatives" and that specifically, as to the critical safeguards issue, "interim licensing of a particular project could, depending on the circumstances, have a tendency to foreclose the later adoption of safeguards alternatives to the particular project" (Pet. App., A-22, A-24).

On May 26, 1976 the Court of Appeals affirmed that part of the NRC order which set out the procedures and schedules for its formulation of a final decision on plutonium recycle, but reversed the order in so far as it allowed the granting of interim commercial licenses for nuclear fuel reprocessing and other plutonium recycle related activities. The Court specifically stated that the NRC "may of course grant licenses for experimental and feasibility purposes in the interim period" thereby allowing for a demonstration of the aspects of the fuel cycle which are as yet new and unproven (Pet. App. A-71, Pet. No. 76-653, p. 7).*

It is relevant to note that in the order of November 11, 1975 the NRC projected the final safeguards supplement to GESMO would be available by mid-1976 (Pet. App., A-33). The Court of Appeals had stated in denying petitions for rehearing below (Pet. App., A-76):

> "The Commission's decision to commence commercial licensing without awaiting the results of the GESMO supplement was the fundamental error of the November 11, 1975 order."

Yet, to date the safeguards supplement has not been released even in draft form. Because of the complex subject matter of the supplement and the schedules for finalizing impact statements, it is unlikely that a final version will be forthcoming for several months.

Subsequent to the Court of Appeals' decision it became apparent that the Administration's policies on plutonium recycle had begun to change. On October 28, 1976 President Ford made a new statement on nuclear policy for the Nation which was to underscore the foresight and wisdom of the Court of Appeals' decision.

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*No party has sought review of any portion of the decision other than that which deals with the interim licensing issue.

> "I have concluded that the reprocessing and recycling of plutonium should not proceed unless there is a sound reason to conclude that the world community can effectively overcome the associated risks of proliferation. I believe that avoidance of proliferation must take precedence over economic interests . . . I have decided that the United States should no longer regard reprocessing of used nuclear fuel to produce plutonium as a necessary step in the nuclear fuel cycle, and that we should pursue reprocessing and recycling in the future only if they are found to be consistent with our international objectives." Statement by the President on Nuclear Policy, October 28, 1976, Office of the White House Press Secretary.

This policy has been restated with even greater conviction by the new Administration. On February 22, 1977 the Administration announced it was eliminating $200,000,000 from the 1977 budget for the Liquid Metal Fast Breeder Reactor Program ("LMFBR") which would be dependent on fuel reprocessing and would produce large quantities of plutonium. The Administration expressed doubts about the breeder reactor and the use of plutonium as a source of commercial power.

> "The energy potential of this option must be weighed against the safety questions associated with the LMFBR and the dangers of nuclear proliferation from plutonium reprocessing needed by LMFBR's." ERDA Information Release, February 22, 1976.

The industry petitions create the false impression that interim licensing of plutonium recycle activities will solve the short term energy problems of our Nation. Such is not the case. Plutonium recycle is a long term proposal for meeting our energy needs. The rapidly escalating costs of nuclear technology weigh heavily against increased invest-

ment of our National resources in its immediate development.

More important, the petitions fail to recognize that there is a sharp distinction between hastening the production and distribution of coal, oil, or natural gas and implementing the separation of plutonium for recycle. The latter is a new technology never utilized on a wide commercial scale. Indeed, historically the context of fuel reprocessing has been that of our tightly restricted weapons program. This technology involves issues far different from the considerations involved in the exploitation of other energy resources.

Repeatedly the petitions before the Court make the assumption that industry will reprocess nuclear fuel, that it is inevitable. This disregards NEPA and the policy considerations of concern expressed by both the Ford and Carter Administrations. Contrary to industry's view, our Nation may well choose not to reprocess nuclear fuel, or may choose to delay that decision until alternatives are considered and safeguards developed. Interim licensing of plutonium recycle would reduce our flexibility in the formulation of foreign policy. It would be hard indeed for us to dissuade other countries from reprocessing nuclear fuel if we were to do so ourselves.

If on the other hand the Executive Branch chooses to demonstrate certain aspects of plutonium recycle for "experimental and feasibility purposes" (Pet. App., A-71), the decision below will not stand as any bar to such a course of action. That decision, however, does stand as a necessary buffer between industry pressure and the public decision-making process on the commercialization of plutonium use.

1. The Court of Appeals' decision was in accord with other decisions under NEPA and in complete harmony with this Court's decision in *Kleppe* v. *Sierra Club*.

The major thrust of all the petitions for certiorari is that the Second Circuit has run afoul of the ruling in *Kleppe* v. *Sierra Club*, —— U.S. ——, 96 S. Ct. 2718 (1976). A fundamental flaw in this argument is that the cases are factually so very dissimilar. In *Kleppe* v. *Sierra Club* the plaintiffs argued that the Department of the Interior was required to prepare an EIS which would assess the impacts of coal mining activities on the "Northern Great Plains" region of the United States. Of crucial importance to this Court's decision in that case was the fact that all parties agreed, and the Court of Appeals held, there existed no proposal for a regional plan or program of coal resources development. The Court of Appeals merely found a proposal was "contemplated," and even that limited finding was reversed. 96 S. Ct. at 2727. Hence there was actually no federal action, or proposal for action, by a federal agency requiring NEPA review in a regional EIS, and this Court so held.

In the instant case, in contrast, all agree that preparation of the GESMO is required by NEPA, that a proposal exists which requires such a review, and that a complete GESMO has not yet been circulated in even draft form. Yet the Commission attempted to allow the licensing of nuclear reprocessing facilities and mixed oxide fuel fabrication facilities, the use of mixed oxide fuel in operating reactors and the supporting transport of nuclear material, all prior to GESMO's completion.

It is significant that in *Kleppe* v. *Sierra Club* a final EIS covering the nationwide program of coal-related activities had been completed and filed before the case came to this Court. 96 S. Ct. at 2725. In addition, the plaintiffs

in that case never challenged the EIS on individual mining sites in the Powder River Basin which had, likewise, been completed and filed prior to suit; instead, they attacked a non-existent proposal for regional action.

The principles of law this Court expressed in *Kleppe* fully support the Court of Appeals' determination in this case. In *Kleppe* the court found NEPA to be an "action forcing" statute, not a dead letter. 96 S. Ct. at 2730-2731. The important policy goals fostered by the Act were strongly supported by this Court. Id.

It is, in any event, inappropriate to compare the leasing of coal rights to the licensing of plutonium recycle activities. Coal mining is not a new technology; it has been practiced throughout the United States since the colonial period. Both the methodology of extraction and the general environmental effects therefrom are known and tested. Plutonium recycle technology, however, has never been commercially licensed in the United States except for one experimental nuclear fuel reprocessing facility which is now closed.* Whatever the environmental effects of coal mining, they do not approach the potential impacts of plutonium recycle, which involves opportunities for a diversion of plutonium and the subsequent manufacture of illicit nuclear weapons. Simply put, coal mining does not even remotely involve the hazards of weapons proliferation.

2. The Court of Appeals' decision is not in conflict with other appellate decisions.

Petitioners' reliance on *Union of Concerned Scientists* v. *AEC*, 499 F. 2d 1069 (D.C. Cir. 1974) and *Nader* v. *Nuclear Regulatory Commission*, 513 F. 2d 1045 (D.C. Cir., 1975) is inappropriate, as both are clearly distinguishable.

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* Even Allied General Nuclear Services, *et al.* admit that some aspects of plutonium recycle are unproven (Pet. No. 76-653, p. 7).

In those cases, the former a review of a licensing decision and the latter a collateral review of a denial of a petition to the NRC, the petitioners sought to halt operation and licensing of nuclear reactors on the basis of new Commission acceptance criteria for emergency core cooling systems. The commitment to generate electricity by nuclear reactors had long ago been made, and no decision on their overall safety and environmental effects was outstanding. No new technology would be introduced by additional reactor licensing, thereby foreclosing alternatives and imposing on the public unknown risks. A court order halting reactor operations would have altered the *status quo*, not preserved it. This distinction holds as well for *Natural Resources Defense Council* v. *NRC*, ——, F. 2d ——, 9 ERC 1149 (D.C. Cir. 1976); Order Staying Mandate, Nos. 74-1385, 74-1586 (D.C. Cir. Oct. 8, 1976) (per curiam); cert. granted —— U.S. ——, 45 U.S.L.W. 3554, February 22, 1977. In contrast, no plutonium recycle-related facilities are as yet licensed for commercial operation in the United States. The decision whether to allow this technology to operate commercially is to be made in GESMO.

Aberdeen and Rockfish R. Co. v. *SCRAP*, 422 U.S. 89 (1975), presents a similar set of facts to *Union of Concerned Scientists* and *Nader* in that the railroad rates complained of had for many years discriminated, in the petitioner's view, against recyclables. The Interstate Commerce Commission's refusal to suspend the proposed rate increases did not alter the *status quo*.

In *Scientists' Institute for Public Information, Inc.* v. *AEC*, 418 F. 2d 1079 (D.C. Cir. 1973), the court ordered the preparation of an environmental impact statement for a program of technology development, which was far from implementation. The court found that the program was a major federal action which would significantly affect the environment, and required the Commission to prepare an

impact statement so that environmental effects would be considered early on in the process, before an unalterable commitment of resources was made. *Id.* at 1088-89. In the present case, the November 11 order would allow the implementation of a new technology before the environmental assessment of that technology is complete—exactly what NEPA was designed to prevent. The court in *Scientists' Institute* had no need to enjoin the development program, which was still in its early stages. New York does not believe that the NRC may now bypass NEPA because of the lateness of its own GESMO review.

The petitioners attempt to justify interim licensing of plutonium-related facilities on the theory that the criteria the NRC has proposed were reasonable and within its administrative discretion. The NEPA review of any plutonium related facility, by excluding all generic issues, would necessarily be inadequate. The Court of Appeals was indeed correct in finding the criteria for interim licensing to be meaningless (Pet. App., A-25, 26, A-66), as a brief hypothetical example will disclose. How could a licensing board determine the environmental and health effects of a plutonium recycle facility without being able to hear evidence of generic plutonium environmental and health effects? Yet those are questions exclusively consigned to the generic proceeding on GESMO. It is simply not possible to justify, from a NEPA cost-benefit standpoint, a plutonium recycle facility independent of any analysis of the environmental effects of plutonium. Similarly, any interim licensing decision as to a particular recycle facility would foreclose consideration of safeguard alternatives such as

not separating plutonium from spent fuel rods into an isolated form, susceptible to theft. Obviously, other alternatives would be foreclosed as well, such as the nuclear park concept (Pet. App., A-73, n. 14).

The petitioners suggest that a recycling facility may perhaps be cost-justified on the recycle of uranium alone (Pet. No. 76-762, p. 13). This misses the point that reprocessing for uranium will incur certain environmental costs which will be identical to those associated with plutonium reprocessing and will also foreclose certain safeguards options. These points would not be aired in a licensing hearing on an individual facility.*

In its November 11 order, the Commission admitted that interim licensing could foreclose safeguard alternatives (Pet. App., A-22), yet it stated:

> "The Commission . . . has concluded that it will be in the public interest to permit interim licensing under interim licensing eligibility criteria . . ." (Pet. App., A-24)

Whether or not it is in the public interest to recycle plutonium is, of course, the very decision to be made in GESMO. It cannot be made at this early date, or by a licensing board, but only after a decision on the GESMO.**

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* The contention of industry that individual facilities can be viewed in isolation is belied by the admission that the steps for plutonium recycle "are carried out at a series of *coordinated* facilities." (Pet. No. 76-744, p. 5 n. 6)

** The Court recognized in *American Commercial Lines, Inc.* v. *Louisville and Nashville R.R. Co.*, 329 U.S. 581, 591 (1968), curiously cited by petitioner in No. 76-774, that action by the Interstate Commerce Commission ("ICC") in an individual rate proceeding would render moot the rule making proceeding designed to make a broad scale examination of the standards to be used in ICC rate cases.

3. The November 11, 1975, order of the Commission established rules for interim licensing of plutonium-related facilities and for the conduct of GESMO hearing which were reviewable in the Court of Appeals.

There is no question that the rules and regulations of the Commission are reviewable in the Court of Appeals. The Administrative Orders Review Act, 28 U.S.C. § 2342, provides that the Court of Appeals has:

> "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . (4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42."

42 U.S.C. § 2239 provides for judicial review of all final orders entered "in any proceeding for the issuance and modification of rules and regulations dealing with the activities of licensees . . ."

The Court of Appeals properly held that the Commission's November 11, 1975 order was "essentially an exercise in rulemaking." (Pet. App., A-53). While petitioners, attempting to portray the order as non-reviewable, seek to characterize it as a set of "guidelines" or "general policy statements," the procedures for promulgation of the November 11 order and its purported effect belie those labels. As this Court pointed out in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 416 (1941), "[t]he particular label placed upon [an action] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is conclusive." See to the same effect *Pacific Gas and Electric Co.* v. *F.P.C.*, 506 F. 2d 33 (D.C. Cir. 1974); *Pickus* v. *U.S. Board of Parole*, 507 F. 2d 1107 (D.C. Cir. 1974).

The NRC clearly followed the procedures for rulemaking set forth in 5 U.S.C. § 553 in issuing this order. On May 8,

1975, the Commission issued a preliminary order which provided for a supplemental generic environmental impact statement concerning safeguards for plutonium-related facilities, and a prohibition on the use of mixed oxide fuels in nuclear power reactors and licensing of fuel-cycle facilities before the decision on GESMO was final. 40 Fed. Reg. 20142. Hundreds of comments were received by the Commission, resulting in its November 11 order which reversed the original proposal and allowed the use of mixed oxide fuel and interim licensing pending a decision on GESMO.* In later decisions on licensing of individual facilities, the November 11 rules would have merely been interpreted, but their underlying policies would not have been questioned. This is a classic definition of rulemaking. *Pacific Gas and Electric Co.* v. *FPC, supra,* 506 F. 2d at 38 and 39. Furthermore, as these rules would have affected the rights of the individual applicants, the Commission was not exempt from the requirements of the Administrative Procedure Act, 5 U.S.C. § 553. *Pickus* v. *U.S. Board of Parole, supra,* 507 F. 2d at 1112.

The Court of Appeals properly found that the November 11 order was final and reviewable. Petitioners protest that since this order does not itself license any facilities, it lacks finality. If that were true, no agency rules would

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* The Commission proposed an expedited schedule for the GESMO proceedings so that the period when plutonium-related fuel-cycle facilities would be operating without a decision on GESMO would be minimal (Pet. App., A-18, 19, 33). The final decision on GESMO was scheduled for early 1977. *Ibid.*, A-33. However, at oral argument in the Court of Appeals, the Commission admitted there had been some "slippage" in the GESMO timetable (Pet. App., A-47). The petitioners now complain it will be years before a final decision on GESMO (Pet. No. 76-653, p. 11). This also supports the view of the Court of Appeals that the Commission was less than genuine in its proposal for interim licensing (Pet. App., A-56).

be reviewable until applied in an agency adjudicatory proceeding. This of course is not the law. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). This Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967) and its companion cases* adopted a policy of "a flexible view of finality." 387 U.S. at 150. This case was clearly proper for judicial review since there was an extensive administrative record of over fifteen hundred pages for the Court of Appeals to rely on, which would not be affected by the administrative records of individual facility licensing proceedings.** Furthermore, failure to review the November 11 order would have resulted in hardship to all the parties. Petitioners do not hide the extent of their investments which they seek to protect,*** and certainly the public and the Commission would have suffered from having to engage in invalid licensing proceedings.

This Court's decision in *Kleppe* v. *Sierra Club, supra,* comports fully with the decision below. This Court ruled in *Kleppe* that a federal agency must have a final impact statement prepared at the time it makes a proposal for federal action. 96 Sup. Ct. at 2728. The federal action contemplated in the November 11 order was, in effect, no different than the action contemplated in GESMO itself, i.e. licensing of plutonium-related activities. The only difference was that the November 11 order sought to allow licensing before the completion of environmental and safeguards studies rather than after. Just as the final GESMO decision will undoubtedly be reviewable in the Court of Appeals, so was the November 11 order.

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* *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967) and *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967).

** The Commission has ruled, in the *Matter of Consumers Power Co.*, (Big Rock Nuclear Plant) Docket No. 50-155, NRCI-75/8, CLI 75-10, p. 88, that individual licensing boards need not consider issues heard in the GESMO proceeding. See also 10 C.F.R. § 2.758.

*** See Petition in No. 76-653, p. 5.

CONCLUSION

The petitions for certiorari should be denied.

Dated: New York, New York, March 4, 1977.

Respectfully submitted,

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APPENDIX A

20 Jan 1975

Dear Mr. Anders:

The Council on Environmental Quality has reviewed WASH-1327, the draft Generic Environmental Statement on the Use of Recycle Plutonium in Mixed Oxide Fuels in Light Water Reactors (GESMO).

Although, in general, this draft is well done and reflects a high quality effort, the Council believes that it is incomplete because it fails to present a detailed and comprehensive analysis of the environmental impacts of potential diversion of special nuclear materials and of alternative safeguards programs to protect the public from such a threat. We understand that the Atomic Energy Commission (AEC) chose to give summary treatment to the diversion and safeguards issues in GESMO with the intention of dealing with these matters definitively in a separate future action. The purpose of this letter is to recommend that the Nuclear Regulatory Commission (NRC), as successor to the AEC, adopt an alternative course of action.

The potential impacts of the diversion and illicit use of special nuclear materials are well recognized. This threat is so grave that it could determine the acceptability of plutonium recycle as a viable component of this Nation's nuclear electric power system. Thus, we believe that the NRC, the Executive Branch, the Congress, and the American people should have the benefit of a full discussion of the diversion and safeguards problem, its impacts, and potential mitigating measures, before any final decisions are made on plutonium recycle.

The National Environmental Policy Act requires that, in preparing an environmental impact statement, the agency develop and describe appropriate alternatives where unresolved conflicts exist. Alternative safeguards programs

for dealing with the threat of diversion of special nuclear materials have not yet been developed. As such, the information necessary to make sound and reasoned decisions on plutonium recycle was not available for governmental and public consideration in the draft GESMO. Because of this, the Council believes that the draft environmental impact statement does not meet the requirements of the National Environmental Policy Act.

To bring the draft statement into conformance with NEPA we recommend the following:

- The NRC should identify alternative safeguard programs which could protect the public from the unauthorized use of special nuclear materials.
- The impacts—environmental, economic, social, legal and institutional—of each alternative safeguards program should be fully analyzed.
- The NRC should present these alternative safeguard programs, including its proposed, preferred alternative, in an addendum to the draft environmental impact statement (GESMO) which should be circulated for review and comment according to CEQ guidelines and existing NRC procedures for draft environmental impact statements.
- After considering the comments received on both the initial draft environmental impact statement and the addendum, the NRC should proceed with preparation of the final environmental impact statement.
- Only after these steps have been carried out should a final decision be made on whether to permit the commercial recycling of plutonium in light water reactors.

Because the NRC will be called upon to make decisions which are not directly related to the draft environmental impact statement in question, but which have clear implications for alternative safeguards programs, we are mak-

ing the following additional recommendations:

- A decision on whether or not to permit construction of the mixed oxide fuel fabrication plant at Anderson, S.C. should be deferred until safeguards studies are completed, an acceptable safeguards program approved, and, in particular, the future role of integrated fuel cycle facilities (IFCF's) has been determined.
- During the period in which the safeguards issue is being resolved, the Commission should take care to avoid actions which would foreclose future options, such as IFCF's and power parks, or which would result in the unnecessary "grandfathering" of certain nuclear facilities.

The Council is prepared to discuss these matters with you in depth. If you, or members of your staff, have any question concerning our comments or recommendations, please do not hesitate to call on us.

Sincerely,

Russell W. Peterson
Chairman

Honorable William A. Anders
Chairman
Nuclear Regulatory Commission
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bcc: Smiley, Giambusso, NRC
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Myers, Rowe, EPA
O'Neill, Loweth, OMB
Zarb, FEA
DuVal, Domestic Council
Peterson (2), Jellinek, Widman, Riordan, Brubaker, Baldwin
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APPENDIX B

28 U.S.C. § 2342 (Administrative Orders Review Act, § 4) provides:

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42; and

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

42 U.S.C. § 2239 (Atomic Energy Act of 1954 as amended, § 189) provides:

(a) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees,

and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. . . .

(b) Any final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended, and to the provisions of section 10 of the Administrative Procedure Act, as amended.

5 U.S.C. § 553 (Administrative Procedure Act, § 553) provides:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

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